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June 22, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Michael K. Powell
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

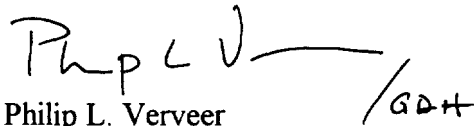
Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Commissioner Powell:

During the course of our meeting on Thursday, June 1st, you inquired about the jurisdictional bases that would support the Commission's establishment of nondiscriminatory access rules. As explained in the attached summary, the Commission possess several bases of authority over building owners to effectuate the requirement. The Commission also may exercise its jurisdiction over carriers' practices to achieve the same goal.

Should you have any questions concerning the attached, please feel free to contact me.

Very truly yours,



Philip L. Verveer
Counsel for WINSTAR COMMUNICATIONS, INC.

cc:	Peter Tenhula	Thomas Sugrue (WTB)	Jeffrey Steinberg (WTB)
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JURISDICTIONAL BASES TO IMPOSE BUILDING ACCESS REQUIREMENTS

- The Commission has jurisdiction over building owners who are operating as telecommunications carriers.
 - Building owners increasingly are controlling telecommunications carriers' access to consumers and, in some cases, are entering the telecommunications business themselves. The Commission has jurisdiction over all persons engaged in interstate wire or radio communications in the United States.¹ To the extent that building owners provide telecommunications service to their tenants, they are subject to the jurisdiction of the Commission and can be required to provide competing carriers nondiscriminatory access to their tenants.²
- Even where building owners do not qualify as telecommunications carriers, the Commission possesses authority to impose nondiscriminatory access requirements and to require that charges for access to tenants in MTEs are just and reasonable pursuant to its ancillary jurisdiction.
 - Properly understood, the doctrine of ancillary jurisdiction permits the Commission to regulate activities or things over which it has actual jurisdiction in circumstances where specific statutory instructions are lacking and do so by reference to analogous provisions in the Act. For example, the Supreme Court has held that the Commission was permitted to regulate cable television systems to the extent that such regulation was "reasonably ancillary" to the successful discharging of its duties with respect to regulation of television broadcasting, and despite the lack of any explicit authority over cable television in the Act.³
 - Sections 1 and 2(a) of the Act grant the Commission plenary authority over interstate wire and radio communications.⁴ By comprehensive definition of "communications by wire" in Section 3(52), the Commission's subject matter jurisdiction includes ". . . all instrumentalities, facilities, apparatus, and services . . . incidental to . . . [interstate] transmission" by wire.⁵ The definition of radio communication in Section 3(33)

¹ 47 U.S.C. § 152(a).

² See Barbara Martinez, "REIT Interest For Broadband, Access Adds Up to More Than Just Semantics," Wall St. J. (March 15, 2000) (stating that six of the seven original REITs involved in Broadband Office, a provider of communications services to tenants on MTEs, do not intend to let direct competitors into their buildings).

³ United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

⁴ 47 U.S.C. §§ 151, 152(a).

⁵ Id. § 153(52).

includes an identical reference to instrumentalities concerning transmission by radio.⁶ Thus, the Commission has jurisdiction to regulate instrumentalities and facilities that are incidental to wire or radio communications.

- Access to intra-MTE wiring and space is integral to providing telecommunications service to tenants of MTEs. Accordingly, the Commission has jurisdiction over intra-MTE wiring and the space necessary for the installation of telecommunications equipment in MTEs as instrumentalities or facilities of interstate communication.
- The exercise of its ancillary jurisdiction by the Commission over intra-MTE wiring and space is necessary to prevent unreasonable restrictions on telecommunications carriers' access to consumers in MTEs.⁷ The record in the Competitive Networks rulemaking demonstrates that unreasonable restrictions on telecommunications carriers access to tenants in MTEs either prohibit altogether the practice of providing interstate wire and radio communication or impose onerous costs necessitating an unreasonable increase in the charges in conflict with the goals of the Act. In order to maintain just and reasonable rates for interstate communication by wire and radio, the FCC has authority to regulate inputs such as the rates for and requirements by which carriers obtain access to consumers in MTEs.
- The Commission has jurisdiction under Section 224 to require nondiscriminatory access to ducts, conduit, and rights-of-way in MTEs.
 - Section 224 requires that a utility provide nondiscriminatory access to any duct, conduit, or right-of-way owned or controlled by it.⁸ Properly implemented, Section 224 would enable competitive carriers to gain access to consumers in MTEs through utility rights-of-way and other facilities.
 - Where a covered utility has used or has a rooftop right-of-way to install equipment on the roof, telecommunications carriers must be granted similar access under Section 224. Moreover, even in the absence of a specific reference to rooftop access,

⁶ Id. § 153(33).

⁷ Other agencies also recognize the critical importance to tenants of obtaining telecommunications services. In passing upon a real estate investment trust's provision of telecommunications services to tenants, the Internal Revenue Service described telecommunications services as "essential" and would not consider such services to be rendered "primarily for the convenience of the tenants." See IRS Letter Ruling LTR 199935071, Doc. 1999-28641 (rel. June 3, 1999)(as reported in Tax Notes Today, Sept. 7, 1999).

⁸ 47 U.S.C. § 224(f)(1).

permitting wireless CLECs to install antennas on rooftop rights-of-way would not typically exceed the broad rights often granted under a utility's easement.

- The Commission can also accommodate access to risers and other in-building conduit in MTEs by classifying riser conduit as a right-of-way through an MTE or by amending its current rules to include in-building conduit within the relevant definition.
- The Commission may exercise its jurisdiction over carriers' practices in order to ensure access to buildings on nondiscriminatory and reasonable terms.
- It is well established that the Commission may exercise its jurisdiction over carriers to achieve valid regulatory objectives in circumstances where the regulation will have a significant effect on other enterprises.
 - In a leading example, the Commission determined that the surcharges imposed by hotels and apartment houses on end users were charges for or in connection with the use of interstate and foreign telecommunications services and, therefore, were charges over which the Commission retained jurisdiction.⁹ The Supreme Court affirmed that the Commission has authority to regulate indirectly the reasonableness of hotel and apartment house activities related to interstate and foreign communications services through direct regulation of carrier tariff requirements.¹⁰
 - The Commission limited the prime time programming that a network affiliate in the top 50 markets could take from a network.¹¹ A federal appeals court upheld the Commission's authority to accomplish its goal of limiting television network control through indirect means by regulating the affiliates as opposed to the networks themselves.¹²
 - The Commission determined to regulate the data processing activities of common carriers by requiring, among other things, the establishment of a separate corporate affiliate for such activities.¹³ A court held that "even absent

⁹ Special Telephone Charges of Hotels, 10 F.C.C. 252, 264 (1943)

¹⁰ Ambassador, Inc. v. United States, 325 U.S. 317 (1945).

¹¹ Network Television Broadcasting, 23 F.C.C.2d 382, 394 (1970).

¹² Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 480 (2d Cir. 1971). Notably, the court also held that the Commission is permitted to directly regulate the activities of the networks through its syndication and financial interest rules when it believes that the networks' activities would impede the ability of licensees to operate in the public interest. Id. at 487.

¹³ GTE Service Corp. v. FCC, 474 F.2d 724, 731 (2d Cir. 1973).

explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional opportunity to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications services."¹⁴

- More recently, the Commission found that it possesses authority under the Act to establish benchmark settlement rates that U.S. carriers must pay presumably non-jurisdictional foreign carriers for termination of international traffic originating in the United States in order to remedy anticompetitive conditions in the international marketplace.¹⁵

¹⁴ Id. However, the Commission's authority did not extend to regulation of the conduct of the data processing affiliates where "[i]ts concern . . . is not for the communications market which Congress has entrusted to its care, but for data processing which is beyond its charge and which the Commission itself has announced it declines to regulate." Id. at 733.

¹⁵ In re International Settlement Rates, 14 FCC Rcd. 9256, at ¶ 2 (1999).